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No. 654

In the Supreme Court of the United States

OCTOBER TERM, 1958

ANTOINETTE M. FARACO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MELVA M. GRAVES,
CARLTON ELDRIDGE,
Attorneys,
Department of Justice,
Washington 25, D.C.

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OPINIONS BELOW

The opinion of the Tax Court (R. 2-7)[1] is reported at 29 T.C. 674. The opinion of the Court of Appeals (Pet. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1958. (Pet. 5a.) The petition for a writ of certiorari was filed on January 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

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[1] Record references ("R.") are to the appendix to the brief for the petitioner filed in the court below. Supplemental record references ("Supp. R.") are to the appendix to the brief for the respondent filed in the court below.

QUESTIONS PRESENTED

1. Whether taxpayer's basis for a certain bus terminal property acquired by her and her late husband as tenants by the entirety is, under Section 113(a) of the Internal Revenue Code of 1939, the cost of the property rather than the fair market value of the property at the date of her husband's death.

2. Whether Section 2 of the Internal Revenue Code of 1954, containing the so-called split income provisions applicable to joint returns filed by husband and wife, is constitutional.

STATUTES INVOLVED

Sections 113(a) and 114(a) of the Internal Revenue Code of 1939 and Sections 1014(a) and (b) and 7851(a) of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 6-8.

STATEMENT

The taxpayer's husband died on December 26, 1953, leaving all of his estate to the taxpayer. At the husband's death, the taxpayer and her husband held, by previous acquisition, certain bus terminal property as tenants by the entirety with common law rights of survivorship, 68.55 percent of the basis of which was allocable to depreciable improvements. The original cost of the property was $159,029.33. (Supp. R. 27-28.) Its fair market value at the date of the death of the taxpayer's husband was $650,000. (R. 4.)

On her 1954 income tax return, the taxpayer claimed depreciation with respect to the bus terminal property on the basis of the original cost of the property but in 1956 filed a claim for refund of $2,920.01 on the ground that she was entitled to claim depreciation on

the basis of the fair market value of the property at the time of her husband's death. (R. 4.) The Tax Court held that her basis for the property was its original cost (R. 4-5), and the Court of Appeals affirmed (Pet. 1a-2a).

Contending that Section 2 of the Internal Revenue Code of 1954 is unconstitutional, the taxpayer also sought in the Tax Court to recover the difference in the tax paid on her 1954 return and the amount of tax which would have been due if she had been married during that year and thus entitled to file a joint return with her husband under Section 2. The Tax Court held that the constitutional issue was not sufficiently raised in the taxpayer's petition for review (R. 6), and the Court of Appeals, affirming on this issue, held that 1954 Code Section 2 is constitutional (Pet. 4a).

ARGUMENT

1. The court below correctly held that, under Section 113(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 6), the original cost of the bus terminal property was the taxpayer's depreciation base for the property. Under Section 113(a), the cost of property is the depreciation base unless the situation falls within one of the listed exceptions. The taxpayer relied upon the exception listed in paragraph (5), which provides that, if the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of the property at the time of such acquisition. The court below, following this Court's decision in *Lang* v. *Commissioner*, 289 U.S. 109, properly held that exception to be inapplicable because there is no new acquisition by the survivor as to property held as tenants by the entirety.

As the court below noted (Pet. 2a-4a), Section 1014(b)(9) of the Internal Revenue Code of 1954 (Appendix, p. 7), on which the taxpayer also relies, is limited to those cases in which the decedent died after December 31, 1953. Consequently, it is not applicable here where the decedent died on December 26, 1953.

Further, there is no merit in the taxpayer's assertion (Pet. 9) that Section 113(a)(5) of the 1939 Code was unqualifiedly repealed by the 1954 Code and that the taxpayer is in effect left with a zero basis. Section 113(a) was only repealed with respect to taxable years beginning after December 31, 1953. See Section 7851 of the 1954 Code (Appendix, *infra*, p. 8).

2. The court below was clearly correct in holding that Section 2 of the Internal Revenue Code of 1954, containing the so-called split income provisions applicable to joint returns filed by husband and wife, is constitutional. Congress has, of course, wide latitude in the field of taxation. *Nichols* v. *Coolidge*, 274 U.S. 531; *Heiner* v. *Donnan*, 285 U.S. 312; *Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1. Income splitting through filing joint returns is a privilege (cf. *Sullivan* v. *Commissioner*, 256 F. 2d 664 (C.A. 4th)) which Congress was not required to extend to single persons (although in Section 2 Congress has extended the privilege for two years to surviving spouses meeting certain requirements, under which the taxpayer apparently could not qualify).[2] The difference between married and single status affords a permissible basis for different tax

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[2] The split income provision was first enacted in 1948 by the addition of Section 12(d) to the Internal Revenue Code of 1939. Revenue Act of 1948, c. 168, 62 Stat. 110, Sec. 301.

treatment and there is plainly no invidious discrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MELVA M. GRANEY,
CARTER BLEDSOE,
Attorneys.

FEBRUARY, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U.S.C. 1952 ed., Sec. 114.)

Internal Revenue Code of 1954:

SUBTITLE A—INCOME TAXES

* * * * *

CHAPTER 1—NORMAL TAXES AND SURTAXES

* * * * *

SEC. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

(a) *In General.*—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

(b) *Property Acquired from the Decedent.*—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

* * * * *

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required

to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. * * *

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 1014.)

SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules.*—Except as otherwise provided in any section of this title—

(1) *Subtitle A.*—

(A) Chapters 1, 2, 4, and 6 of this title shall apply only with respect to taxable years beginning after December 31, 1953, and ending after the date of enactment of this title, and with respect to such taxable years, chapters 1 (except sections 143 and 144) and 2, and section 3851, of the Internal Revenue Code of 1939, are hereby repealed.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7851.)

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